AMER
RECORDS
AND
BRIEFS

FILED
AUG 15 2014

No. 14-103

In The
Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER, P.C.,
Petitioners,

v.

ASARCO LLC,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

RALPH D. MCBRIDE
BRYAN S. DUMESNIL
BRADLEY J. BENOIT
JEFFREY L. OLDHAM
Counsel of Record
BRACEWELL & GIULIANI LLP
711 Louisiana St., Ste. 2300
Houston, TX 77002
(713) 223-2300
jeff.oldham@bgllp.com

Counsel for Respondent ASARCO LLC

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The court of appeals held that § 330 of the Bankruptcy Code does not provide the required explicit statutory authority to award fees for litigating (as opposed to preparing) a fee application, though it made clear that parties can recover fees under a settled exception to the American Rule where there is bad faith or vexatious conduct by an opposing party. No such conduct was alleged or found here.

The question presented is whether, when there is no finding of bad faith or vexatious conduct, a party seeking attorneys' fees for litigating a fee application can obtain recovery under § 330.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF FOR RESPONDENT IN OPPOSITION 1

OPINIONS BELOW 1

JURISDICTION 1

PRELIMINARY STATEMENT 1

STATEMENT 2

A. Proceedings In The Bankruptcy Court 2

B. Proceedings In The District Court And On Remand 4

C. Proceedings In The Court Of Appeals 5

REASONS FOR DENYING THE PETITION 8

I. There Is No Material Split Between The Fifth And Ninth Circuits. 9

II. More Percolation On The Issue Is Merited. 14

III. There Is No Important Question Of Federal Law Presented. 16

IV The Court Of Appeals Correctly Decided The Case. 18

A. The American Rule Governs Fee Awards. 19

B. No Exception To The American Rule Applies Here. 19

TABLE OF CONTENTS
(continued)

Page

C. Policy Arguments Do Not Support Awarding Fees. 24

V. The Issue Should Be Left To Congress. 25

CONCLUSION....26

TABLE OF AUTHORITIES

Page(s)

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975).....19, 20, 24, 25, 26

Boyd v. Engman,
404 B.R. 467 (W.D. Mich. 2009) 21

*Buckhannon Bd. & Care Home, Inc. v.
W. Va. Dept. of Health & Human Res.*,
532 U.S. 598 (2001).....19

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991).....9, 11, 15

Corley v. United States,
556 U.S. 303 (2009).....21

Frazin v. Haynes & Boone, LLP (In re Frazin),
413 B.R. 378 (Bankr. N.D. Tex. 2009) 12

Grant v. George Schumann Tire & Battery Co.,
908 F.2d 874 (11th Cir. 1990).....14, 15

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010).....19

In re ACT Mfg., Inc.,
281 B.R. 468 (Bankr. D. Mass. 2002).....11

In re Consolidated Bancshares, Inc.,
785 F.2d 1249 (5th Cir. 1986).....8

In re Fibermark, Inc.,
349 B.R. 385 (Bankr. D. Vt. 2006).....11

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Riverside-Linden Inv. Co.,
945 F.2d 320 (9th Cir. 1991).....10, 12, 13

In re Smith,
317 F.3d 918 (9th Cir. 2002).....*passim*

In re St. Rita's Assocs. Private Placement, L.P.,
260 B.R. 650 (Bankr. W.D.N.Y. 2001).....13, 22

In re Teraforce Tech. Corp.,
347 B.R. 838 (Bankr. N.D. Tex. 2006) 7, 13

In re Wind N' Wave,
509 F.3d 938 (9th Cir. 2007).....17

In re Wireless Telecomms. Inc.,
449 B.R. 228 (Bankr. M.D. Pa. 2011).....22

Key Tronic Corp. v. U.S.,
511 U.S. 809 (1994).....20, 23

Lamie v. United States Trustee,
540 U.S. 526 (2004).....15, 16

Longhorn Partners Pipelines L.P. v. KM Liquids Terminals, L.L.C.,
408 B.R. 90 (Bankr. S.D. Tex. 2009) 15

Monessen Sw. Ry. Co. v. Morgan,
486 U.S. 330 (1988).....22

Ngiraingas v. Sanchez,
495 U.S. 182 (1990).....22

TABLE OF AUTHORITIES
(continued)

Page(s)

Rice v. Sioux City Mem'l Park Cemetary, 349 U.S. 70 (1955) 18

STATUTES

11 U.S.C. § 327 16

11 U.S.C. § 330 ..... *passim*

11 U.S.C. § 330(a) 5, 21

11 U.S.C. § 330(a)(1) 10

11 U.S.C. § 330(a)(3)(A) 21

11 U.S.C. § 330(a)(3)(B) 21

11 U.S.C. § 330(a)(3)(C) 6

11 U.S.C. § 330(a)(3)(D) 21

11 U.S.C. § 330(a)(3)(E) 21

11 U.S.C. § 330(a)(3)(F) 23

11 U.S.C. § 330(a)(4) 6

11 U.S.C. § 330(a)(4)(A) 10

11 U.S.C. § 330(a)(6) 4, 6, 13, 20, 21, 22

11 U.S.C. § 503(b)(4) 17

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES
(continued)

Page(s)

RULES

Sup. Ct. R. 10 18

Sup. Ct. R. 10(a) 13

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent ASARCO LLC respectfully requests that the Court deny the petition for a writ of certiorari filed in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 751 F.3d 291. The district court's opinion is reported at 477 B.R. 661. The bankruptcy court's opinion is unreported, but it is available at 2011 WL 2974957.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2014. The petition for writ of certiorari was filed on July 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PRELIMINARY STATEMENT

Petitioners seek this Court's review by alleging that the court of appeals has created a circuit conflict on an important question of federal bankruptcy law. In reality, petitioners seek review because after receiving more than $120 million in attorneys' fees for their bankruptcy work—plus receiving an additional award of $4 million in fee enhancements—they want *$5 million* more because they chose to have 191 timekeepers, including 150 attorneys, work on litigating their fee applications. Yet there is no allegation or finding in this case that ASARCO's objections to petitioners' fee requests were made in bad faith. On such facts, no court of appeals has held that fees for litigating a fee application are recoverable. As explained below, there is no meaningful conflict on the issue

presented here because both the Fifth and Ninth Circuits allow recovery of fees for frivolous or bad faith objections, whether under § 330 or a settled exception to the American Rule. Nor is this issue sufficiently developed or significant enough to merit this Court's review at this time. The Court should deny review.

STATEMENT

Petitioners served as debtors' counsel to ASARCO LLC. They collectively were paid over $120 million in lodestar fees and have been awarded over $4 million more in fee enhancements. Pet. App. 3a-4a, 21a. This dispute involves petitioners' attempt to receive over $5 million more in fees for litigating their fee requests. *Id.* at 4a, 21a.

A. Proceedings In The Bankruptcy Court

Following the effective date of ASARCO's plan of reorganization, petitioners filed final fee applications with the bankruptcy court seeking (i) over $120 million in lodestar fees for work done as debtors' counsel, (ii) over $24 million in fee enhancements, (iii) expense reimbursements, and (iv) over $8 million in fees for litigating both the fee applications and the requested fee enhancement. *Id.* at 56a; C.A. Rec. 7051.

In response, ASARCO maintained that certain of the lodestar fees were excessive and in violation of local bankruptcy rules because, among other things, many time descriptions were vague, much of the fees included non-compensable clerical or administrative tasks, and numerous time entries were lumped or block-billed. C.A. Rec. 6058-68. ASARCO also initially objected to a portion of petitioners' expenses,

although the parties later resolved those issues by agreement. Pet. App. 58a.

ASARCO also objected to the request for fee enhancements, noting that petitioners had been adequately compensated at their full hourly rates that they had set—and increased throughout the bankruptcy—and that these lodestar fees were paid without delay during the bankruptcy. Sealed C.A. Rec. 589-607, 623-61.

ASARCO further objected to the request for fees for litigating either the fee application or the requested fee enhancement. C.A. Rec. 6883-6902. Citing the statute and numerous opinions, ASARCO maintained that § 330 of the Bankruptcy Code does not permit recovery of fees for litigating a fee application or a fee enhancement. *Id.* at 6887-93, 6900-02. ASARCO also argued that Baker Botts' request for over $8 million in fees for the five-month litigation over fees—including billing from over 191 Baker Botts timekeepers (150 attorneys)—was excessive. *Id.* at 6893-6900.

Petitioners' assertion that "*every single objection* was overruled," Pet. 5, is inaccurate. After ASARCO filed its objections, Baker Botts agreed to reduce its fee request by $112,927 and its expense reimbursement request by $19,463.52. Pet. App. 145a, Sealed C.A. Rec. 2018-21. The bankruptcy court also reduced the requested fee enhancement by approximately $20 million. Pet. App. 133a-135a. Petitioners assert that "[n]o party disputed the amount of defense fees." Pet. 25. The truth is that ASARCO did dispute the amount of fees, and the bankruptcy court found that the fees sought for

litigating the fee request were "higher than were reasonable and necessary." Pet. App. 142a.

The bankruptcy court nevertheless awarded Baker Botts $5 million (reduced from the requested $8 million) for litigating both the fee application and the fee enhancement request. *Ibid.* It concluded that § 330(a)(6), which addresses fees for preparing a fee application, also permitted recovery of fees for defending a fee application and pursuing a fee enhancement. *Id.* at 135a, 140a-141a. Citing policy considerations such as dilution of fees, the bankruptcy court rejected the cases denying recovery of fees for litigating fee applications and fee enhancements. *Id.* at 136a-141a.

Notably, although the bankruptcy court overruled ASARCO's objections to the lodestar fees that petitioners sought after agreed-upon reductions, petitioners never contended, and the bankruptcy court made no finding, that ASARCO's objections were frivolous or made in bad faith. *Id.* at 21a, 55a-151a.

B. Proceedings In The District Court And On Remand

Adopting the reasoning of the bankruptcy court, the district court concluded that fees for defending the lodestar fees were recoverable. *Id.* at 45a-47a. It reversed, however, the bankruptcy court's determination that Baker Botts could recover fees for its pursuit of a fee enhancement. *Id.* at 48a-49a. Rejecting Baker Botts' request for fees incurred while pursuing additional fees (enhancements on top of the lodestar fees paid at rates that Baker Botts set), the district court found that such fees were not compensable because they did not benefit the estate.

Id. at 48a. As a "further reason" for its decision, the district court also rejected the argument that pursuing a fee enhancement was necessary to the administration of the estate. *Id.* at 48a-49a.

Because the bankruptcy court had awarded $5 million in fees for litigation of *both* the lodestar fees and the fee enhancement, the district court remanded to the bankruptcy court for a determination of the amount of fees recoverable solely for litigation of the lodestar fees. *Id.* at 54a. On remand, despite having initially awarded $5 million for both tasks, and despite having cut Baker Botts' initial "fees for defense of fees" request by over 37% for being higher than was reasonable, the bankruptcy court concluded that *all* of the $5 million fee previously awarded was for litigation of the lodestar fees, and that none was awarded for pursuit of the fee enhancement. *Id.* at 147a-151a.[1]

C. Proceedings In The Court Of Appeals

While the Fifth Circuit affirmed the ruling allowing petitioners to recover over $4 million in fee enhancements, it reversed the award of fees for litigating the lodestar fees. *Id.* at 21a. It carefully analyzed the statutory text, concluding that "[s]ection 330(a) does not authorize compensation for

---

[1] ASARCO elected not to appeal the determination of the *amount* of fees for litigating the fee application, in part due to the discretion afforded such decisions on appeal. While it is therefore accurate to note that ASARCO did not appeal that determination, it is a distortion to claim that it is "undisputed" that "petitioners reasonably spent over $5 million solely to defend their fee applications," Pet. 5, or that "[n]o party disputed the amount of defense fees." *Id.* at 25.

the costs counsel or professionals bear to defend their fee applications." *Id.* at 14a.

The court specifically rejected the bankruptcy court's and the district court's reliance on § 330(a)(6) as authority for fees defending a fee application: "[T]he specification of an award for 'preparation of a fee application' is clearly different from authorizing fees for the defense of the application in a court hearing." *Id.* at 15a (quoting § 330(a)(6)). The court further reasoned that interpreting § 330(a)(3)(C) as authorizing compensation for professional fee applications would render § 330(a)(6) superfluous. *Id.* at 16a.[2]

Finding an "absence of explicit statutory guidance" for awarding fees for defending a fee application, the court applied the "American Rule that each party to litigation bears its own costs." *Id.* at 17a. Further, the court noted that "the exception to the American Rule that allows fee shifting where an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" is available, yet was not raised in this case. *Id.* at 21a.

The Fifth Circuit rejected petitioners' attempt to justify their requests for fees on other language in § 330 or on policy rationales. Section 330 prohibits compensation for "services that were not reasonably likely to benefit the debtor's estate *or* necessary to case administration." *Id.* at 14a (citing § 330(a)(3)(C), (4)). Because the fee applicant is the primary beneficiary of a fee application, and because

---

[2] It appears that this portion of the Fifth Circuit's opinion contains a typographical error, referencing § 330(a)(4) rather than § 330(a)(6).

the debtor's estate bears the cost of litigating fee applications, the court concluded that the "straightforward reading" of these provisions supports the conclusion that fees for defense of a fee application are not compensable. *Id.* at 15a. The court also found that analogizing to federal fee shifting statutes was unwarranted because "Congress designed fee shifting provisions in express derogation of the American Rule," with the intent that "the losing party should bear the full costs of counsel for the winner." *Id.* at 17a. The court concluded that there is no such "explicit statutory guidance" in § 330 and "the equities are quite different in bankruptcy." *Ibid.*

Further, the Fifth Circuit found "difficult to analyze"—because it requires judgments "in the eye of the beholder"—petitioners' claim that not awarding fees for litigating the fee application would unfairly dilute fees below that of non-bankruptcy lawyers. *Id.* at 18a-19a. Beyond the comparability achieved by applying reasonably comparable rates and adjusting compensation in light of specific circumstances, the court found that "[m]ore cannot easily be demanded" from the statute's language. *Id.* at 18a. The court also credited the opinion of an "astute bankruptcy court" that the comparability principle actually supports the denial of fees because the American Rule applies outside of bankruptcy to deny fees unless an exception is established. *Id.* at 19a (citing *In re Teraforce Tech. Corp.*, 347 B.R. 838, 867 (Bankr. N.D. Tex. 2006) (Houser, J.)). Although § 330 statutorily authorizes recovery of certain fees, the court held that "[s]ection 330 is not fairly read to include 'fees for defense of fees.'" *Id.* at 19a-20a.

Finally, the Fifth Circuit emphasized that its "opinion should not be read as encouraging tactical or ill-supported objections to fee applications." *Id.* at 20a-21a. The court first noted that the concern may be overstated, recounting its prior observation that too frequently bankruptcy professionals, "sharing the mutual goal of securing approval for their fees, enter into a conspiracy of silence with regard to contesting each other's fee applications." *Id.* at 20a (quoting *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1255 (5th Cir. 1986)). But where objections are asserted, the court expressed confidence that bankruptcy courts, "practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications." *Id.* at 21a. The court stated that, where appropriate, courts "should not hesitate to implement" the bad faith exception to the American Rule. *Ibid.* The court noted that ASARCO was not alleged or found to have engaged in any bad faith conduct. *Ibid.*

REASONS FOR DENYING THE PETITION

Contrary to petitioners' arguments, there is no meaningful conflict between the Fifth Circuit's decision and the Ninth Circuit's opinion in *In re Smith*, 317 F.3d 918 (9th Cir. 2002). Even if the opinions were in conflict, it would at best constitute a nascent split—with the two decisions coming more than a decade apart—that would merit further percolation among the courts of appeals. Moreover, the issue in dispute is not sufficiently important to merit review, as evidenced by the dearth of courts of appeals rulings (and even the relative lack of lower-court opinions) on the issue over the past 35 years since the 1978 amendments that adopted the

comparability factor. Finally, the Fifth Circuit was correct in determining that § 330 contains no explicit statutory authorization for fees for litigating a fee application, and any decision whether to permit such fees should be left to Congress. The Court should deny review.

I. There Is No Material Split Between The Fifth And Ninth Circuits.

Petitioners' claim that the Fifth and Ninth Circuits have "squarely divided" ignores the materially different facts that each court confronted. The Ninth Circuit decided a case in which the bankruptcy court expressly found the opposing party's objections to be "frivolous," and thus that court made no holding about whether fees could be awarded under § 330 in the absence of such a circumstance. *In re Smith*, 317 F.3d at 929. By contrast, the Fifth Circuit noted there was no issue raised in this case of bad faith or vexatious objections, and it made clear that fees could be awarded in the case of bad faith or vexatious conduct under *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Pet. App. 21a. Thus, while the courts may have differed in their interpretation of § 330, it cannot be said that the opinions created a conflict that matters because they addressed materially different facts—one in which the objections were found to be frivolous, and one in which the objections were not. And both cases recognized that fees could be awarded (albeit under different sources) where the opposing party acts in bad faith or vexatiously.

For this reason, in arguing that "the split could not be starker," petitioners are wrong to assert that "[d]efense fees are never available in the Fifth

Circuit as a matter of law." Pet. 19. In fact, the Fifth Circuit confirmed that bankruptcy courts can and should, where appropriate, implement the bad faith exception to the American Rule that allows fee shifting for bad faith or vexatious conduct—precisely the conduct at issue in *Smith*, though not here. Pet. App. 20a-21a. There is no material conflict.

The finding in *Smith* that the objections were "frivolous" is not a simple factual distinction without a difference; it was a basis for the Ninth Circuit's award of fees. In deciding whether to award fees, the Ninth Circuit concluded the applicant must demonstrate two things: (1) "the services for which compensation is sought satisfy the requirements of section 330(a)(4)(A)" and (2) the "case exemplifies a 'set of circumstances' where the time and expense incurred by the litigation is 'necessary' within the meaning of section 330(a)(1)." *In re Smith*, 317 F.3d at 928. In concluding that fees were warranted under the second element of this test, the Ninth Circuit relied upon the bankruptcy court's conclusion that the objections were frivolous. *Id.* at 929. Moreover, in an earlier case that did not involve frivolous objections, but instead had most objections sustained, the Ninth Circuit affirmed the bankruptcy court's denial of litigation fees. *See In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 322-23 (9th Cir. 1991).

Accordingly, while petitioners describe "the only issue in both cases" as "whether courts may assess defense fees at all," the Fifth and Ninth Circuits reached the same conclusion on that question: yes, depending upon the circumstances. While the courts read § 330 differently, there is no reason to believe that the Fifth Circuit would have reached a different

outcome in *In re Smith*, as it encouraged awards of defense fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Pet. App. 21a. Although it would rely on *Chambers* to award fees, there is simply no reason to doubt that the Fifth Circuit would have affirmed the bankruptcy court's decision in *Smith* to award fees for responding to "frivolous" objections that were "extraordinarily wasteful of the resources available in bankruptcy." *In re Smith*, 317 F.3d at 921-22.

Further, the Fifth Circuit's observation that this case did not merit application of the bad faith exception to the American Rule is well-grounded in both the procedural history of the case and the substantive law. In spite of petitioners' protests about the lack of merit in ASARCO's objections, they do not assert—and have never asserted—that ASARCO's objections constituted bad faith conduct under *Chambers*. Pet. App. 21a. This was no mere oversight by petitioners; as a matter of substantive law, no credible claim could have been made that ASARCO's objections supported the bad faith exception. ASARCO's objections were similar, and often identical, to objections that other bankruptcy courts have accepted. *See, e.g.*, *In re Fibermark, Inc.*, 349 B.R. 385, 396-97, 402, 406 (Bankr. D. Vt. 2006) (disallowing fees for vague or lumped time descriptions and clerical tasks); *In re ACT Mfg., Inc.*, 281 B.R. 468, 485 (Bankr. D. Mass. 2002) (same). The fact that the bankruptcy court ultimately overruled ASARCO's objections, despite similar issues with Baker Botts' billing and despite the requirements of the local bankruptcy rules, does not undermine the fact that ASARCO made its

objections in good faith.[3] Additionally, ASARCO's decision not to pursue these objections on appeal does not demonstrate that the objections were insincere; to the contrary, it demonstrates a good faith decision by ASARCO to focus its appellate arguments and to not pursue such challenges when appellate deference to the bankruptcy court's decisions would have made prevailing difficult.

Just as there is no reason to believe the Fifth Circuit would have reached a different ultimate outcome in deciding *In re Smith*, there is no reason to presume the Ninth Circuit would have resolved this case differently. As noted above, the Ninth Circuit has denied fees when the objections were not frivolous. *See In re Riverside-Linden*, 945 F.2d at 322-23. And while the objecting party in *In re Riverside-Linden* may have enjoyed a greater degree of success than ASARCO, it remains true that ASARCO's objections resulted in a meaningful reduction of the fees that petitioners were seeking. Pet. App. 145a.

An "astute bankruptcy court" (as the Fifth Circuit put it in citing that court with approval) used this very basis to harmonize the Ninth Circuit's opinions with its application of the American Rule:

---

[3] *See, e.g., Frazin v. Haynes & Boone, LLP (In re Frazin)*, 413 B.R. 378, 403 (Bankr. N.D. Tex. 2009) ("[D]efeat on the merits does not, by itself, justify an award of attorney's fees under the bad faith exception. . Attorneys' fees will not be awarded even where a claim lacks merit, if there is no evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court." (internal quotation marks and citation omitted)), *aff'd in part and rev'd in part on other grounds*, 732 F.3d 313 (5th Cir. 2014).

> *In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650 (Bankr. W.D.N.Y. 2001) held that while debtor's counsel was entitled to be compensated for the preparation of its fee application pursuant to section 330(a)(6), it was not entitled to compensation for defending its fee application against objections thereto, especially since the objections were filed in good faith and ultimately resulted in a partial disallowance of the requested fees. 260 B.R. at 652. The *St. Rita's* court reasoned that such a rule comported with the "American rule" of recovery, applicable to fee disputes occurring outside the realm of bankruptcy. The court did not go so far as to preclude any recovery of attorney fees incurred in defending a fee application—in fact, it left open the door to recovery of such fees where sanctions are appropriate for the filing of inappropriate objections. A careful reading of *Riverside-Linden* and *Smith* cases, cited above for differing propositions, supports the *St. Rita's* compromising analysis.

In re Teraforce, 347 B.R. at 866-67 (Houser, J.). There is no material split between the Fifth and Ninth Circuits.

Petitioners also claim that review is warranted based on a division among lower courts, Pet. 21-22, but this Court ordinarily considers only important splits among the courts of appeals. Sup. Ct. R. 10(a).

Petitioners offer no basis for departing from that practice in this case. Furthermore, review is not warranted because there is no widespread division among the courts on any important issue. To the contrary, as explained below, so few cases have addressed the issue, even at the lower court levels, that it is clear the issue is not an important one meriting this Court's review. *See* Part III, *infra*.

II. More Percolation On The Issue Is Merited.

If there were a material conflict between the Fifth and Ninth Circuits, it would constitute a nascent split of just two courts of appeals on the issue. Particularly because these opinions have come more than a decade apart, with no apparent development of the issue by other courts of appeals, the Court should await further development before undertaking review. Even adding the Eleventh Circuit, by virtue of its decision denying fees in *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874 (11th Cir. 1990), would not diminish the need for more percolation of this issue in the circuit courts.

Petitioners have attempted to bolster the importance of the few decisions on this issue with data regarding the number of bankruptcy filings in the Fifth, Ninth, and Eleventh Circuits. Pet. 25 & n.11. But the fact remains that over 60% of the bankruptcy filings from last year were in circuits that have not addressed this issue. The Sixth and Seventh Circuits, two of the top four circuits by number of bankruptcy filings made in 2013, are among the courts of appeals that have not addressed this issue. Additionally, the Second and Third Circuits, notable because they encompass two

districts (the Southern District of New York and the District of Delaware) where many of the largest bankruptcies are filed, also have not had occasion to address the issue.[4] Moreover, petitioners claim that the Eleventh Circuit's decision in *Grant* should be disregarded as factually distinguishable and pre-dating the 1994 amendments. *Id.* at 19-20. If the Court credits this view, it adds another court of appeals that has not meaningfully addressed the issue.

Even in the circuits that have addressed the issue, more percolation would clarify the extent to which any conflict exists. As discussed above, there is no material conflict between the Fifth and Ninth Circuits, as the Fifth Circuit would not refuse to award fees (albeit under *Chambers*) where the objections were frivolous, and the Ninth Circuit has not awarded fees under § 330 where such an allegation or finding is lacking. Further, the Ninth Circuit could choose to revisit its decade-old *Smith* decision in light of the Fifth Circuit's decision and this Court's decision in *Lamie v. United States Trustee*, 540 U.S. 526 (2004), which abrogated part of the ruling in *In re Smith*.[5] The Court could benefit

---

[4] *See Longhorn Partners Pipelines L.P. v. KM Liquids Terminals, L.L.C.*, 408 B.R. 90, 102 (Bankr. S.D. Tex. 2009) ("The national trend is for major corporations to file bankruptcy petitions in New York or Delaware rather than the debtor's principal place of business."). There is good reason to consider where the largest bankruptcies are filed, because these bankruptcies present the most likely scenario in which parties could have a dispute of sufficient size to merit litigating fees for fees.

[5] The decision in *Lamie* is germane to this dispute. Under *Lamie*, § 330 does not permit compensation to debtors' counsel for time spent other than in representation of a trustee

from additional development of the issue in the courts of appeals that have addressed the issue and the many others that have not.

III. There Is No Important Question Of Federal Law Presented.

Petitioners argue that the issue presented is one of great importance, claiming that "[t]his issue recurs repeatedly in bankruptcy courts nationwide" and that "[t]he defense of fees is thus a potential issue in *every* bankruptcy case involving estate-paid professionals." Pet. 5, 23. Petitioners even represent that "[t]he Fifth Circuit's decision affects the entire bankruptcy system." *Id.* at 24.

These statements are wildly exaggerated on their face and cannot be squared with reality. Indeed, the virtual absence of decisions on the issue convincingly demonstrates that the issue is not significant. Despite the theoretical possibility of this issue arising in "every bankruptcy case," only *three* courts of appeals have apparently addressed the issue in over *35 years* since the 1978 amendments to the Bankruptcy Code. Only two courts of appeals have addressed the issue in the 20 years since the 1994 amendments, and those opinions were

---

or debtor-in-possession under § 327. *See Lamie*, 540 U.S. at 534 ("A debtor's attorney not engaged as provided by § 327 is simply not included within the class of persons eligible for compensation. Unless the applicant for compensation is in one of the named classes of persons in the first part, the kind of service rendered is irrelevant."). The fees petitioners seek were not incurred during employment as counsel for the debtor-in-possession under § 327; they were incurred after the effective date of the plan of reorganization and after the debtor-in-possession ceased to exist. Pet. 8.

separated by 12 years.[6] Even as to the lower courts, petitioners cite a total of only 57 reported cases over a 32-year period. Pet. App. 167a-171a. This represents an infinitesimally small percentage of the bankruptcy cases filed during that timeframe.[7] Petitioners cannot explain how an issue that arises in roughly two published lower court cases for every million bankruptcy cases filed—leading to one court of appeals opinion on the subject every 12 years—is significant enough to merit this Court's attention. Certainly, petitioners' claim of harm to "the entire bankruptcy system" cannot be taken seriously.

Moreover, petitioners acknowledge, as they must, that two courts of appeals and several lower courts have *denied* fees for litigating a fee application. Pet. 21; Pet. App. 167a-171a. There is no indication that these decisions are threatening the sound functioning of the bankruptcy system or deterring lawyers from practicing bankruptcy law.

To merit this Court's review, the question should extend "beyond the academic or the episodic."

---

[6] Petitioners discuss *In re Wind N' Wave*, 509 F.3d 938 (9th Cir. 2007) as if it were another Ninth Circuit case determining fee issues under § 330, but the statute at issue in that case was 11 U.S.C. § 503(b)(4). *Id.* at 941 ("This appeal presents an issue of first impression and turns on the interpretation of Bankruptcy Code Section 503(b)(4).").

[7] According to annual statistics from the Administrative Office of the U.S. Courts, over one million bankruptcy filings were made in 2013 alone. For the years 1990-2013 (the data available on the website for the Administrative Office of the U.S. Courts), the average number of annual bankruptcy filings was over 1.2 million per year. Using only the total number of filings since 1990, and leaving off all filings during the eight years from 1982-1989, yields a percentage of reported cases involving "fees for defense of fees" of less than 0.0002%.

See Rice v. Sioux City Mem'l Park Cemetary, 349 U.S. 70, 73-74 (1955) (applying an earlier version of this Court's rules). This case involves an issue that arises only episodically, and it arises here only because of Baker Botts' 191-timekeeper, 150-lawyer effort that somehow was felt needed to defend prior work and that led to an alleged $5 million in collateral fees.[8] This Court does not "sit for the benefit of the particular litigants." *Id.* at 74 (citation omitted). This case does not involve an important question of federal law that warrants this Court's review. Sup. Ct. R. 10.

IV. The Court Of Appeals Correctly Decided The Case.

Even if there were a conflict worthy of this Court's attention, the Court should deny review here because the court of appeals resolved the issue correctly. Notwithstanding all of their arguments,

---

[8] The notion that ASARCO forced Baker Botts to incur this amount of fees is unsupportable. Baker Botts itself decided to conduct a "self-audit" of its invoices—when those invoices should have been prepared correctly on a contemporaneous basis—and that self-audit revealed enough issues for Baker Botts to generate a massive "1160-page supplement" to the original invoices. Pet. 8. Additionally, while Baker Botts complains about the time it spent responding to what it inaccurately characterizes as an onerous discovery request, ASARCO actually requested the file it owned by virtue of paying over $100 million in fees to Baker Botts. Baker Botts *sua sponte* spent 2,440 hours reviewing that file, all purportedly in an attempt "to avoid revealing privileged information" when it was ASARCO, as the client, that owned the file and the privilege. *Id.* at 8-9. Further, to the extent Baker Botts intermingled other clients' privileged information in ASARCO's file, ASARCO was not at all responsible for the cost of the effort to segregate that information.

petitioners have not pointed to anything in the statute that clearly departs from the American Rule to authorize fees for litigating fees. Petitioners' attacks on the Fifth Circuit's opinion give too little consideration to the statutory text and far too much weight to asserted policy considerations. In doing so, petitioners invite the Court to assume "roving authority" to award fees on policy grounds in the absence of statutory authorization, an invitation this Court has refused in other cases. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 532 U.S. 598, 609 (2001). The court of appeals correctly applied the American Rule to deny petitioners' fees for litigating their fee applications because Congress has not explicitly allowed the recovery of these fees.

A. The American Rule Governs Fee Awards.

The American Rule, by which each litigant pays its own attorneys' fees subject to certain limited exceptions, is this Court's "basic point of reference when considering the award of attorney's fees." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-53 (2010) (internal quotation marks and citations omitted). The American Rule is a "bedrock principle" that is "deeply rooted in our history and in congressional policy." *Id.* at 253; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975).

B. No Exception To The American Rule Applies Here.

This Court has recognized four exceptions to the American Rule: (1) a contract between the parties allowing recovery of fees, (2) a specific statute,

(3) the common fund theory, and (4) cases involving willful disobedience of a court order or instances of bad faith, vexatious, wanton or oppressive conduct. *See Alyeska*, 421 U.S. at 257-59. The only basis alleged here is that § 330 makes an exception to the American Rule. To avoid the American Rule on this basis, the Court requires "explicit statutory authority." *Key Tronic Corp. v. U.S.*, 511 U.S. 809, 819 (1994).

Section 330(a)(6) expressly authorizes recovery of fees incurred in preparing a fee application, but § 330 contains no provision that explicitly allows recovery of fees for litigating a fee application. That is the "straightforward reading" of the statute credited by the court of appeals. Pet. App. 15a. Petitioners' challenges to this analysis of the statute lack merit.

Petitioners claim that § 330(a)(6) is not a "textual grant" of authority for fees, but rather only "provides a metric for setting fee-preparation compensation." Pet. 29. Petitioners claim that fees for preparing a fee application and fees for litigating a fee application are instead authorized by other portions of the statute granting broad authority to compensate estate professionals. *Id.* at 27, 29.

Petitioners' argument that § 330(a)(6) is not a textual grant of authorization is contrary to their initial position—which they persuaded the bankruptcy court to adopt without changing a word—that "section 330(a)(6) authorizes a bankruptcy court to award a professional fees and expenses for defending a fee application if the professional is successful." Pet. App. 135a. Petitioners' new position also is contrary to the plain

language of the statute, as acknowledged even in those opinions upon which petitioners most heavily rely. *See, e.g.*, *In re Smith*, 317 F.3d at 928 ("While section 330(a) expressly contemplates compensation for fee preparation, it does not mention compensation for other services associated with the preparation of fee applications, such as litigation in defense of fee applications."); *Boyd v. Engman*, 404 B.R. 467, 482 (W.D. Mich. 2009) ("The Bankruptcy Code expressly states that attorneys may recover fees for the 'preparation of a fee application.' The code does not directly address whether attorneys may also be compensated for fees incurred in responding to objections to a fee application." (citations omitted)).

Petitioners' assertion that the sole purpose of § 330(a)(6) was to provide the standard for how much to compensate for preparing a fee application also is misguided. If fees for preparing a fee application were already authorized under a broad grant of authority, there would be no need to specify that the fees must be based on the level and skill reasonably required to prepare the application, as these criteria are articulated in earlier parts of § 330. 11 U.S.C. § 330(a)(3)(A), (B), (D), and (E). Petitioners' interpretation therefore renders § 330(a)(6) superfluous, and the Fifth Circuit rightly rejected this interpretation. Pet. App. 16a; *see Corley v. United States*, 556 U.S. 303, 314 (2009) (noting that avoiding surplusage is "one of the most basic interpretative canons").

Congress' provision for fees in preparing the fee application, while omitting any similar provision for litigating the fee application, was not mere happenstance that can be ignored. Prior to the 1994

amendments that added the provision for preparation of the fee application, courts had reached differing conclusions on whether fees for the preparation and defense of the fee application were recoverable. *See In re St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 651 (Bankr. W.D.N.Y. 2001). In testimony before Congress, the American Bankruptcy Institute urged Congress to make both "expressly compensable." *In re Wireless Telecomms. Inc.*, 449 B.R. 228, 236 (Bankr. M.D. Pa. 2011). Congress did not do so: "This was obviously a position partially rejected by Congress which provided for compensation for the preparation of the application, but not the prosecution of such." *Id.* (citation omitted). In expressly stating only that fees for the preparation of the fee application were recoverable, Congress implicitly foreclosed recoverability of fees for litigating the fee application on the basis of a statutory exception. *Cf. Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336 (1988) ("We can discern a sufficiently clear indication of legislative intent with regard to prejudgment interest under the FELA, however, when we consider Congress' silence on this matter in the appropriate historical context."); *see also Ngiraingas v. Sanchez*, 495 U.S. 182, 188-89 (1990) (concluding that congressional "silence on [a] matter is itself a significant indication of the legislative intent" (internal quotation marks and citation omitted)). Congress' silence here is particularly meaningful in light of the American Rule. The Fifth Circuit correctly held that § 330(a)(6) supports the conclusion that § 330 does not permit fees for litigating the fee application. Pet. App. 15a-16a.

In reaching its conclusion, the Fifth Circuit properly acknowledged the distinction between the services that professionals render during a bankruptcy case to benefit and administer the estate—compensation for which is expressly permitted under the statute—and the fees that professionals incur to litigate their own fee requests—which are not expressly permitted under the statute. *Id.* at 14a-16a. Petitioners try to divine authority for fees for litigating fee requests by cobbling together purported "textual indications of statutory breadth," such as the 1994 amendments relating to fees "necessary to administration of the case" or "beneficial at the time at which the service was rendered toward the completion" of a case, or § 330(a)(3)(F)'s requirement to consider the compensation of non-bankruptcy practitioners. Pet. 26-28, 31-33. But these provisions have meaning and application wholly unrelated to allowing fees for litigating fee requests, and the Fifth Circuit properly ruled that they fall far short of the American Rule's requirement for "explicit statutory authority" for fees. Pet. App. 14a-20a.

Petitioners also argue that "fees for defense of fees" should be recoverable because Congress did not expressly enact a "categorical ban" of these fees. Pet. 27, 34. This argument turns the American Rule on its head. The rule, as it pertains to the statutory exception, is that litigation fees are not recoverable unless Congress explicitly authorized them—not that fees are recoverable unless Congress explicitly disallows them. *Key Tronic*, 511 U.S. at 819.

C. Policy Arguments Do Not Support Awarding Fees.

Judicial views regarding what may be fair or good policy do not permit departures from the American Rule. *See Alyeska*, 421 U.S. at 260-61, 263-64, 269-70. To do so would "invade the legislature's province." *Id.* at 271. Yet the courts that have awarded fees for litigating a fee application have done so primarily on the basis of "policy" and "fairness reasons." *See, e.g.*, Pet. App. 140a. Reliance on such judicial policy considerations, even if those considerations are well-founded, is erroneous. It is the exclusive responsibility of Congress to decide whether to make an explicit statutory authorization of fees if it believes doing so is appropriate.

Moreover, petitioners' policy arguments are not well-founded. As the Fifth Circuit noted, comparability with non-bankruptcy lawyers supports the *denial* of fees because non-bankruptcy lawyers face the same American Rule that bankruptcy lawyers do. *Id.* at 19a.[9] Given that non-bankruptcy lawyers operate under the same rules for litigating fee disputes, there is no valid claim that "parity" demands recovering these fees in bankruptcy, nor is there any indication of an exodus of bankruptcy lawyers in the numerous courts that have denied these fees. Notably, despite their heavy reliance on

---

[9] Petitioners attempt to analogize to civil-rights fee shifting cases. Pet. 33-34. The Fifth Circuit correctly noted that "Congress designed fee shifting provisions in express derogation of the American Rule" while § 330 contains no "explicit statutory guidance" for the award of fees for litigating a fee application. Pet. App. 17a-18a.

parity arguments, petitioners have never rebutted the fact that the American Rule applies to fee disputes outside of bankruptcy.

The argument that the Fifth Circuit's decision will create "perverse incentives to engage in meritless litigation" also has no basis. Pet. 35-36. As the Fifth Circuit noted, bankruptcy courts have significant ability to thwart such attacks through effective case management. Pet. App. 21a. Further, the American Rule allows fee shifting when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Ibid.* While petitioners complain that the standards to invoke this exception are too high, these are the standards that prevail in the courts for every case. In sum, there is nothing to petitioners' arguments, even on the merits.

V. The Issue Should Be Left To Congress.

If Congress wished to make fees for litigating a fee application compensable, it had the power to do so by a statute that explicitly makes it so. Petitioners say that Congress has acted to amend the Bankruptcy Code at various times when it felt this was necessary, Pet. 13-15, showing that Congress is able and willing to do so. But none of the prior amendments included a provision that explicitly authorizes "fees for defense of fees." As noted above, the American Rule is deeply rooted in congressional policy. Congress knows the American Rule and the requirement for explicit statutory authority for an award of fees, and this Court interprets statutes with that in mind. *See Alyeska*, 421 U.S. at 269-71.

Whether to award fees for litigating fee applications is a decision that should be left to

Congress. To allow an award of fees without explicit statutory authority would invade the province of Congress. *Id.* at 271.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH D. MCBRIDE
BRYAN S. DUMESNIL
BRADLEY J. BENOIT
JEFFREY L. OLDHAM
Counsel of Record
BRACEWELL & GIULIANI LLP
711 Louisiana St., Ste. 2300
Houston, TX 77002
(713) 223-2300
jeff.oldham@bgllp.com

Counsel for Respondent ASARCO LLC

AUGUST 2014